Supreme Court, U.S.
FILED
JUL 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-55

No. _____

In The

Supreme Court of the United States

October Term, 1989

CAROL L. PETTYJOHN,

Petitioner,

vs.

KALAMAZOO CENTER CORPORATION
d/b/a/ KALAMAZOO HILTON INN,
a Michigan Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

ISSUE:

WHETHER FEDERAL COURTS IN DIVERSITY OF CITIZENSHIP CASES ARE TO USE STATE SUBSTANTIVE LAW RATHER THAN THE FEDERAL RULES OF EVIDENCE TO MAKE DETERMINATIONS ON THE RELEVANCY AND ADMISSIBILITY OF EVIDENCE?

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The Plaintiff/Appellee, Carol L. Pettyjohn, herein Petitioner, through John Conlon & Associates, P.C., by John Conlon, Esq., prays issuance of a Writ of Certiorari to the Sixth Circuit Court of Appeals from the Judgment entered on the 28th day of February, 1989, the order of the Sixth Circuit Court of Appeals denying Petition for Rehearing En Banc entered on the 12th day of April, 1989, and the Judgment of the Sixth Circuit Court of Appeals issued as a mandate on the 20th day of April, 1989.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals bearing Docket No. 87-1513 was submitted for full text publication. It is appended below as Appendix "A". The order of the Sixth Circuit Court of Appeals, bearing the above-referenced docket number and denying both the request for hearing en banc and relief is appended below as Appendix "B". The Judgment of the United States Court of Appeals for the Sixth Circuit entered as a mandate on the 20th day of April, 1989, is appended below as Appendix "C". The underlying Judgment of the U.S. District Court for the Western District of Michigan, Southern Division, bearing docket number K83-352-CA4, is appended below as Appendix "D".

STATEMENT OF JURISDICTION

The U.S. District Court for the Western District of Michigan, Southern Division, entered Judgment in the favor of the Plaintiff, based on jury verdict, on the 17th

day of November, 1986. On appeal to the U.S. Court of Appeals for the Sixth Circuit at Cincinnati, Ohio, an order reversing and remanding the case to the U.S. District Court for the Western District of Michigan for retrial was entered on the 28th day of February, 1989. A rehearing en banc, on the issue brought before this Court, was denied by order of the Court entered on the 12th day of April, 1989.

The jurisdiction of the United States Supreme Court for issuance of Writ of Certiorari is invoked pursuant to 28 USC Sec 1254(1), as authorized pursuant to US Const. Art. No. 3, Sec. 2, Cl. 2.

FEDERAL STATUTORY LAW INVOLVED

The United States Congress passed Public Law 93-595 on January 2, 1975, and it became effective July, 1975. It provides in pertinent part, as follows:

Rule 101 Scope

"These rules govern proceedings in the courts of the United States and before the United States magistrates, to the extent and with the exception stated in Rule 1101."

Rule 1101 Applicability of Rule

"(A) Courts and magistrates. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court of the District of the Canal Zone, the United States courts of appeals, the Court of Claims, and to United States magistrates, in the actions, cases, and

proceedings, and to the extent hereinafter set forth. ***

(B) Proceedings generally. These rules apply generally to civil action and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the Bankruptcy Act."

Pub. L. 93-595, Jan. 2, 1975; 88 Stat. 1929.

CASE OVERVIEW

ODE DE CLERK

May I have your attention, Most Honorable Clerk. The case presented is a problem worse than a quirk.

That it happened is too unbelievable to be true. It's effect will make the entire trial bar cuckoo.

The matter at issue is of everyday concern. It will make trial judges and trial attorneys have to unlearn.

Of evidence and on admissibility, it does rest. Its confusion it will bring to even the best.

On federal evidence, the Congress has legislated. On following its mandate, the Sixth Circuit has obviated.

No longer are the federal courts unequivocally bound. By the rules of evidence that Congress found.

On the admissibility of evidence the Court of Appeals has rewritten the book. The United States Supreme Court had better take a look.

In diversity actions, we now begin. On the admissibility of evidence, state law is now in.

The holdings of the Supreme Court have been overturned. The directives of the Congress might as well be burned.

The case has been published both near and far. A rehearing en banc did not go very far.

Its holding will frequently be cited hereinafter. The problems created will be greater than the laughter.

The opportunity to correct the record is now at hand. Practitioners and trial judges will be at peril if left to stand.

Importance of the subject matter should not cause you to tarry. The courts in the other circuit have held the contrary.

The problem is of importance to the nation-wide bar. It is almost impossible to have gotten this far.

To avoid the obvious which will be gorey. The United States Supreme Court must grant certiorari.

STATEMENT OF FACTS

Carol Pettyjohn sued the Hilton Hotel at Kalamazoo because the accommodations provided were unsafe and caused her to sustain permanent injuries. The case was tried before a jury. One of the jurors, a hotel industry employee, Ms. Connie Harris, who worked for the Presidential Arms Hotel, was allowed by Plaintiff to sit and deliberate on the case. A unanimous jury, on September

25, 1986, returned a verdict in favor of Plaintiff. It found that the Hilton Hotel accommodations were unsafe and that Plaintiff sustained permanent arm injuries and lost the effective use of her dominant arm and hand. They found that she suffered that loss on August 19, 1980, when injured at the hotel. The problems continued seven (7) years later when the case was submitted for deliberations and determination.

The Hilton Hotel refused the decision and verdict of the jury. It moved for Judgment N.O.V. It moved for a New Trial. It filed its appeal on the 4th day of June, 1987, after the trial court denied all requests for post-judgment relief. The appeal was argued in the Sixth Circuit Court of Appeals on September 22, 1988. The Defendant/Appellant made a broad-based attack on all aspects and parts of the proceedings in the U.S. District Court for the Western District of Michigan. It only aroused sufficient interest of the Sixth Circuit Court of Appeals on a singular relevancy/admissibility of evidence issue.

The trial judge ruled that evidence of a prior and somewhat similar accident in the same Hilton Hotel in 1978, approximately two (2) years before the Plaintiff sustained her injuries, and the notice to the hotel about that accident was admissible for the limited purpose of notice. It was determined to be notice of the defective, dangerous, and unsafe condition.

The issue was first argued at the trial before the taking of testimony. It was then re-argued on the Defendant's Motion for Directed Verdict. Again, it was re-

argued on the Defendant's Motions for Judgment Notwithstanding Verdict and New Trial. The trial judge carefully considered offers of proof. Later, all the evidence presented was considered. As a matter of discretion, it ruled that the evidence could be considered by the jury for that limited purpose.[1]

The Court of Appeals panel which heard the case seized on this admissibility of evidence ruling as its singular basis for reversal. It struck down the lower court jury verdict and judgment. It reversed and remanded the case for a new trial. Now comes the rub! The Court of Appeals made its evidentiary determination based on Michigan evidentiary law. It held that the trial court incorrectly interpreted and misapplied Michigan law on the admissibility and relevancy of evidence about the prior accident.[2] This is a diversity of citizenship case. It is a federal court case!

A petition was filed for rehearing en banc. The attention of the Sixth Circuit Court of Appeals was directed to the fact that the decision stands for the proposition that state laws control issues of relevancy and admissibility in diversity actions tried in the federal courts. This case was

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[1] The Plaintiff sought to have the evidence admitted for consideration by the jury as evidence of negligence, and the Defendant sought to have the evidence totally excluded. The trial judge ruled that it would be admissible for the limited purpose of indicating the notice to the Defendant about the dangerous and defective condition of their premises.

[2] "We believe that the district court incorrectly applied *Freed v. Simon* 370 Mich 473 (1963), ***. Freed does not stand for such proposition. Under Freed, Oehmke's testimony is clearly irrelevant." *Pettyjohn v. Kalamazoo Center Corp.* No. 87-1513.

submitted for full text publication. Its holding is contrary to holdings in other circuits and contrary to the Act of the United States Congress mandating that Federal Rules of Evidence control in federal court proceedings. The issue involved is of significance and importance to nationwide federal jurisprudence. However, the request for rehearing en banc was denied! The clearly erroneous holding stands in contradiction of the general holdings throughout numerous other circuits of the United States Court of Appeals. It is in disregard of the legislative directive of the United States Congress.

This Petition for Writ of Certiorari, from the Judgment and the Order of the U.S. Circuit Court for the Sixth Circuit on Rehearing en Banc, must be granted or confusion will reign. It will mislead trial attorneys and judges. The conclusion it gives is that they are to apply state law standards on the relevancy and admissibility of evidence in diversity actions. It is likely to lead to substantial injustice, the unfair administration of legal proceedings, the creation of unjustifiable expenses and delay, and promote the growth and development of erroneous interpretations on what law to apply for rulings on evidentiary matters. All of this is contrary to the intended ends and objectives of the Congress in enacting Public Law 93595.

The issue involved is simple and uncomplicated! It has significant and long-range consequences. They can be obviated by the United States Supreme Court through the definitive ruling sought by the Plaintiff. It must take the case and hold that the Federal Rules of Evidence, and not the state laws on evidence, are to be applied in litigation in the Federal Courts.

LEGAL ARGUMENT

THE FEDERAL COURTS IN DIVERSITY OF CITIZENSHIP CASES ARE TO USE THE FEDERAL RULES OF EVIDENCE AND NOT STATE SUBSTANTIVE LAW WHEN MAKING DETERMINATIONS ON THE RELEVANCY AND ADMISSIBILITY OF EVIDENCE.

This is a personal injury case. It is travelling through the federal court system because the Plaintiff Carol Pettyjohn was a citizen of New Hampshire and the Defendant Hilton Hotel was a Michigan Corporation in August, 1980, when she was injured and lost the full and effective use of her dominant hand and arm. It is not a big money case. The jury verdict was for a mere fifty-eight thousand five hundred dollars ($58,500.00) for the permanent loss of the full and effective use of her dominant hand. However, it is an extremely important case from the standpoint of federal diversity litigation. It has rewritten and overruled established federal evidentiary law. It should not be allowed to stand! In its present context, it adds to a common misunderstanding of how and when the substantive law of a state is applied in a diversity action. It emasculates the Federal Rules of Evidence.

An admissibility of evidence question is the singular issue creating controversy. The holding by the Sixth Circuit Court of Appeals gives credence to a misbelief that the doctrine of *Erie v. Tompkins* 304 US 64; 58 S.Ct. 817; 82 LEd 118 (1938) requires the application of state law indiversity cases on evidentiary issues when there is state case law on point.[3]

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[3] The Defendant/Appellant Hilton Hotel asserted on appeal that Michigan law would exclude evidence of prior

(Continued on following page)

The misconception and misunderstanding of federal law is pervasive. The Sixth Circuit Court of Appeals has proclaimed its misunderstanding and misinterpretation! It has added to the confusion and misunderstanding about the doctrine of *Erie v. Tompkins*, as well as the effect and application of the federal rules of evidence in diversity actions on issues of relevancy and admissibility of evidence. The domino effect is rolling ever onward! Only the United States Supreme Court can set the record straight.

The trial judge, on remand, has been directed by the Court of Appeals to make evidentiary determinations based on state law, when there is state case law pertaining to the matter at issue. There will be built in reversible error if the trial judge applies the wrong law on the issue that was the basis for reversal. It leads to this petition! We are dealing with a runaway train and only the U.S. Supreme Court, through issuance of a Writ of Certiorari, can apply the brakes.

The issue before this Court deals with the relevancy and admissibility of evidence. The applicable rule of evidence in federal court proceedings is FRE 401. It states in pertinent part as follows:

> "*** evidence having any tendency to make the existence of any fact that is of consequence to the deter-

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(Continued from previous page)

accidents for the purpose of showing notice. It unequivocally claimed that because diversity of citizen was the basis of jurisdiction, state evidentiary law is to be applied. Brief of Defendant/Appellant, p. 20, footnote 1.

mination of the action more probable or less probable than it would be without the evidence."

An issue of relevancy is to be determined by the trial judge based on his or her experience, judgment, and knowledge of human motivation and conduct. *United States v. Williams* 545 F2d 47, 50 (8th Cir 1976). The trial court determined, on different occasions, that the evidence was relevant to show notice. The admissibility of relevant evidence is set forth in the Federal Rules of Evidence, which provides that "all relevant evidence is admissible, except as otherwise provided *** evidence which is not relevant is not admissible." FRE 402. The trial court has great latitude when ruling on the admissibility of evidence. Its rulings are to be upheld unless there is a clear abuse of discretion. *U.S. v. Ashle* 555 F2d 462, 465 (C.A. 5th, 1977), cert denied 434 US 869; 98 S.Ct. 210; 54 LEd2d 147. The proceeding citation sets out federal law on the issue of relevancy and admissibility of evidence.

What makes the Federal Rules of Evidence on relevancy and admissibility applicable and controlling in a diversity action? The intended scope of the Federal Rules of Evidence is stated in FRE 101. They were enacted by Congress to govern litigation in the courts of the United States. In *Kingsley v. Baker/Beechnut Corp.* 546 F2d 136, 140 (5th Cir 1977), it was held the Federal Rules of Evidence govern the admissibility of documentary evidence in federal diversity cases.

The Federal Rules of Evidence are unique and distinct within the concept of federal practice and procedure. They were not enacted pursuant to the Rules Enabling Act, which is 28 USC, Section 2072. They are a

specific Act of Congress and are identifiable as Pub. L. 93-595; 88 Stat. 1929. There is not substantive procedural limitation applicable to the Federal Rules of Evidence, as is found in other rules of practice and procedure adopted by the United States Supreme Court pursuant to 28 USC, 2072. *Boggs v. Blue Diamond Coal Co.* (1980 ED Ky) 497 FedSup 1105; 30 FRServ2d 1.

On the other hand, some of the Federal Rules of Evidence require a specific deference to state law, in diversity cases, on such matters as presumptions, as provided by FRE 302, privileges, as provided by FRE 501, and competency, as provided by FRE 601. These rules call specifically for the application of state law, when state law provides what is called the rule of decision. The issues in dispute do not pertain to any of those sections. Therefore, only the Federal Rules of Evidence are to be applied.

In diversity cases, the Federal Rules of Evidence generally govern the admissibility of evidence. *Johnson v. Ellis & Sons Ironwork* 604 F2d 950, 957 (5th Cir. 1979). The Fifth Circuit Court of Appeals has been active on this issue. In reviewing a district court exclusion of certain evidence, it said that even though it was a diversity action the Federal Rules of Evidence governed the admissibility of that evidence. *Ballou v. Henri Studios, Inc.* 656 F2d 1147, 1153 (5th Cir. 1981).[4]

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[4] This case and *Garwood v. International Paper Co.* 66 F2d 217, 223 (5th Cir. 1982), were cited by *Pettyjohn* at p. 11 of Brief of Plaintiff/Appellee on Appeal.

The issue of applying state law to evidentiary matters was raised by Petition for Writ of Certiorari in a case out of the Seventh Circuit Court of Appeals in 1983. *In re: Air Crash Disaster near Chicago, IL* 701 F2d 1189, 1193 (7th Cir. 1983), cert denied U.S.; 104 S.Ct. 204; 78 LEd2d 178. That court said the Federal Rules of Evidence were unique because they are a statutory enactment, i.e. Pub. L. No. 93-595; 88 Stat. 1959 (1975). The Seventh Circuit Court of Appeals held that the supremacy clause of the United States Constitution and the Rule of Decision Act, 18 USC Sec. 52 (1976) compels their application in federal court proceedings. This is also consistent with 28 USC Sec. 2076. It declares that Congress is invested with full power and control over the rules of evidence. The Supreme Court of the United States has the power to prescribe amendments to the Federal Rules of Evidence. However, they cannot take effect until reported to Congress by the Chief Justice. They do not take effect if disapproved by either house of Congress. Additionally, any rule, whether proposed or enforced, can be amended by Act of Congress. 28 USC Sec. 2076.

The Seventh Circuit Court of Appeals supported its interpretation and holding, that the Federal Rules of Evidence govern the admissibility of evidence in diversity cases, by citing numerous cases from differing jurisdictions. Some of these authorities are as follows: *Pollard v. Metropolitan Life Insurance Co.* 598 F2d 1284, 1286 (3rd Circ. 1978), cert denied 444 US 917; 100 S.Ct. 232; 62 LEd2d 171 (1979); *Gibbs v. State Farm Mutual Insurance Co.* 545 F2d 423, 428, n.2 (9th Circ. 1976); *Croce v. Bromley Corp.* 623 F2d 1084, 1094 (5th Circ. 1980), cert denied 450 US 981; 101 S.Ct. 1516; 67 LEd2d 816 (1981). The clear

pronouncement of these and other cases is that the Federal Rules of Evidence control when the relevancy and admissibility of evidence is at issue. *McInnis v. AMF, Inc.* 765 F2d 240, 244-246 (C.A. 1st 1985). The opinion of the *McInnis* case on the Federal Rules of Evidence is stated in pertinent part as follows:

> "Congress's authority to prescribe such rules, even though they may differ from comparable state rules, has long been recognized. *Hanna v. Plummer* 380 US 460, 461, 463; 85 S.Ct. 1136, 1144-1145; 14 LEd2d 8 (1965) ***.
>
> Congress clearly intended that the FRE would apply to diversity actions. The FRE 1101(b) applies generally to civil and criminal proceedings. This conclusion is underscored by the fact that where Congress deemed it desirable for the state rules to be applied in diversity actions, it created a special proviso to that effect in the federal rules. *** The question remaining is whether the evidence *** was properly admitted under FRE 403 ***. We are bound by the trial judge's ruling of admissibility unless defendant can demonstrate that he exercised his discretion arbitrarily or irrationally."

In addition to the Supreme Court's comments in *Hanna v. Plummer,* supra, on the authority of Congress to prescribe the Federal Rules of Evidence, even before its enactment in 1975, the Supreme Court recognized the limitation on its power to judicially set the rules on matters governed by the federal Constitution or the acts of Congress. *Walker v. Armco Steel Corp.* 44 US 740; 64 LEd2d 659; 100 S.Ct. 1978, 1982 (1980). The power of the Congress to preempt even the Supreme Court is spelled out in 28 U.S.C. 2071. This law declares the limits of the federal court. It

requires them to make rules consistent with acts of Congress.

CONCLUSION

The Sixth Circuit Court of Appeals has erroneously held, in its opinion submitted for full publication, that the relevancy and admissibility of evidence is to be determined under state law rather than the Federal Rules of Evidence. The holding is in direct conflict with the decisions of other circuit courts of appeal on this issue. The Court of Appeals for the Sixth Circuit has decided this important question of federal law different than other circuits. This issue has yet to be addressed specifically by the United States Supreme Court. Because of its importance to federal jurisprudence in diversity of citizenship actions, the United States Supreme Court should become involved and exercise its power of supervision to clearly and definitively settle this issue.

RELIEF REQUESTED

WHEREFORE, your Petitioner prays this Court to grant its petition for issuance of Writ of Certiorari, conduct a full review of the issue involved, reverse the judgment of the United States Court of Appeals for the Sixth Court, remand the case to the U.S. District Court for the Western District of Michigan with the jury verdict and judgment reinstated and affirmed, and allowing taxable costs to the Plaintiff-Appellee. That the United States Supreme Court

may grant any and all other relief to which Petitioner is entitled and as authorized pursuant to 28 USC 2106.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-1513

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CAROL PETTYJOHN, *Plaintiff-Appellee,* v. KALAMAZOO CENTER CORPORATION d/b/a KALAMAZOO HILTON INN, a MICHIGAN CORPORATION, *Defendant-Appellant.*	)	ON APPEAL from the United States District Court for the Western District of Michigan

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Decided and Filed February 28, 1989

Before: MARTIN, and NELSON, Circuit Judges; and EDWARDS, Senior Circuit Judge.

BOYCE F. MARTIN, Jr., Circuit Judge. Kalamazoo Hilton Inn appeals the improper admission at trial of the deposition testimony of Thomas Oehmke explaining the circumstances of a prior slip and fall at the Hilton in 1978 told to him by Dr. Feuer. Kalamazoo Hilton objects to Oehmke's testimony principally as both hearsay and irrelevant for the purpose of showing notice of a dangerous condition which allegedly resulted in Pettyjohn falling in a combination shower and bath unit.

Carol Pettyjohn stayed at the Kalamazoo Hilton on August 19, 1980 where she slipped and fell in a shower and bath tub which contained adhesive strips on the bottom of the tub but no side rails or towel racks. There was a ledge towards the front of the stall where soap was placed. When Pettyjohn reached up to put the soap along the ledge of the tub, she fell. She struck and injured her left arm and hit her head.

At trial, Thomas Oehmke, the attorney for a Dr. Feuer in a previously settled slip and fall claim against Hilton in 1978, testified on deposition to the facts surrounding the fall of Dr. Feuer and the condition of the shower in 1978 as told to him by Dr. Feuer.

The district court denied Hilton's motion in *in limine* to strike or exclude the deposition testimony of Thomas Oehmke as irrelevant testimony of a prior dissimilar accident and held that the deposition testimony was relevant and admissible. The district court further stated that Hilton has waived its objections to Oehmke's testimony on hearsay grounds since the testimony was given in response to Hilton's questions, even though Hilton had a continuing objection as to the relevancy of Oehmke's entire testimony. At trial, Hilton renewed its objections as to the hearsay nature of Oehmke's testimony. The court again overruled the same objection stating that Oehmke's testimony was not being used for the truth but to show that Dr. Feuer gave information concerning his fall to Oehmke.

Hilton argues that Oehmke's testimony regarding the accident of Dr. Feuer was inadmissible because Oehmke's testimony was not relevant to show notice of an unsafe

condition in the shower/tub at Hilton since the district court had found that Dr. Feuer's accident was dissimilar to the later accident of Pettyjohn. *Freed v. Simon*, 370 Mich. 473 (1963). Hilton also claims that Oehmke's testimony relating Dr. Feuer's explanation to Oehmke of his accident was hearsay.

We believe that the district court incorrectly applied *Freed v. Simon*, 370 Mich. 473 (1963), which states that evidence of prior accidents *at the same place* and arising from *the same cause* is admissible to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident *and* to show the defendant's negligence on the theory that defendant, having notice or knowledge of the defect, is held to a higher standard of care. *Id.* at 475. At trial, the district court ruled that the two accidents were not similar:

> The court cannot say that given the potential for confusion of a jury in listening to conditions of the prior accident and given the dissimilarities of the conditions which gave rise to each of these accidents, and given the time span involved, two years, . . . the court is of the opinion that the two accidents are not sufficiently similar that the testimony should be used as evidence of negligence. . . .

In jury instructions, the district court informed the jury that the jury could not consider Oehmke's testimony as evidence of negligence by Hilton but that the jury could consider the testimony as evidence on the issue of notice of the condition of the shower and tub.

If the accidents were dissimilar, as correctly held by the district court, then Oehmke's testimony concerning the first accident of Dr. Feuer was clearly inadmissible

under *Freed* to show *either* notice of a dangerous condition *or* negligence. The two accidents cannot be similar enough to show notice of a dangerous condition but not sufficiently similar to show negligence. *Freed* does not stand for such proposition. Under *Freed* Oehmke's testimony is clearly irrelevant. Because the testimony is irrelevant in the first instance, we need not reach the issue whether, if relevant, the testimony should be nonetheless excluded as hearsay. *See* Fed.R.Evid. 402 (all *relevant* evidence is admissible except as excluded by various listed exceptions including the hearsay rules.)

For the reasons stated above, we reverse the district court and remand for a new trial.

APPENDIX B

No. 87-1513

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CAROL PETTYJOHN, Plaintiff-Appellee, v. KALAMAZOO CENTER CORPORATION, d/b/a KALAMAZOO HILTON INN, A MICHIGAN CORP., Defendant-Appellant.	)	ORDER

(Filed Apr. 12, 1989)

Before: MARTIN, and NELSON, Circuit Judges; and EDWARDS, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-1513

CAROL PETTYJOHN,

Plaintiff-Appellee,

v.

KALAMAZOO CENTER CORPORATION d/b/a KALAMAZOO HILTON INN, a Michigan Corporation,

Defendant-Appellant.

Before: *Martin* and *Nelson*, Circuit Judges; and *Edwards*, Senior Circuit Judge.

JUDGMENT

(Filed Feb 28, 1989)

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed and the case is remanded for a new trial.

IT IS FURTHER ordered that Defendant-Appellant, recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ Leonard Green
Clerk

A True Copy.

Issued as Mandate:
April 20, 1989

Attest:

/s/ Tom Denningus
Deputy Clerk

COSTS: NONE

Filing fee.....$
Printing .....$

Total .....$

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROL PETTYJOHN,

Plaintiff,

vs. File No.: K 83 352 CA4

KALAMAZOO CENTER CORPORATION d/b/a KALAMAZOO HILTON INN, a Michigan Corporation,

Defendant.

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MONETARY JUDGMENT

(Filed Nov. 17, 1986)

This action came on for trial before the Court and a Jury, Honorable Benajmin F. Gibson, District Judge, presiding and the issues having been duly tried and the jury having rendered its verdict.

NOW, THEREFORE;

IT IS ORDERED AND ADJUDGED that Plaintiff, Carol L. Pettyjohn recover from the Defendant, Kalamazoo Center Corporation d/b/a Kalamazoo Hilton Inn the principle sum of $58,500.00.

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff, Carol L. Pettyjohn shall be entitled to receive interest on the principle judgment amount at the statutory rate of twelve (12%) percent compounded annually from July 17, 1983 until the Judgment is satisfied by payment. The accrued interest as October 25, 1986 is $26,389.82.

IT IS FURTHER ORDERED that the Plaintiff shall be entitled to have costs taxed in this case, with the taxed costs to be added to the principle Judgment amount and the accrued interest, and the combined amounts are to bear interest at the rate of twelve (12%) percent compounded annually until satisfied by full payment.

/s/ Benjamin Gibson
Honorable Benjamin Gibson

APPROVED AS TO FORM:

/s/ Stephen Muhich
Stephen Muhich, Esq.

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